FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

against

S. E. ALLWRIGHT, Election Judge, and JAMES J. LIUZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF IN SUPPORT THEREOF

NATIONAL LAWYERS GUILD,
Committee on Constitutional Liberties, as Amicus Curiae,

OSMOND K. FRAENKEL, *Chairman,*
Of Counsel.

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MAY IT PLEASE THE COURT:

The undersigned, as counsel for the Committee on Constitutional Liberties of the National Lawyers Guild, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the petitioner to the filing of this brief has been obtained. Attorney for the respondents has failed to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

Dated, September 17, 1943.

OSMOND K. FRAENKEL,
Counsel for National Lawyers Guild,
Committee on Constitutional Liberties,
as amicus curiae.

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BRIEF OF THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE

The National Lawyers Guild, by its Committee on Constitutional Liberties, asks leave to file this brief herein because of its concern with problems of racial discrimination. We believe it is of the essence of the American Constitution that there be no differentiation between citizens because of race and that in the present time of war it is of especial importance that this principle be recognized and enforced. And in no field is this principle of greater importance than in that here involved. For the elective franchise is the cornerstone of democracy. If that be tainted by the exclusion of any body of citizens, particularly if the exclusion be on racial grounds, then the structure of democracy is in grave danger.

So we come to the precise problems here involved: 1. May a Negro be excluded from participation in the democratic primary because of a resolution purporting to

have been adopted by the state representatives of the party excluding Negroes from membership in that party? 2. And, whatever might be the answer to that problem in general, may there be such exclusion when, as is the case in Texas, by stipulation, nomination by the democratic party in effect ensures election? 3. Finally, can a Negro be excluded on the purported ground of non-membership in the party when Whites are allowed to vote without inquiry as to party affiliation?

1: While this Court, in the *Grovey* case, 295 U. S. 47, rejected the argument there made that a Negro could not be excluded from participation in a primary that controlled the election, its later decision in the *Classic* case, 313 U. S. 301, indicates a changed view on that point. There the Court clearly indicated that if the primary "effectively controls the choice" the federal government had power to regulate such primary, insofar as elections for members of Congress were concerned. Clearly, if federal power extends to prevent fraud in such a primary, it likewise extends to prevent discrimination. So much appears conceded and was assumed in the Trial Court.

But the Trial Court believed that this point would not alone have sustained the decision in the *Classic* case. Since, however, this Court referred to its two grounds of decision in the disjunctive, there is no basis for concluding that it did not mean what it said. Indeed, the opinion separately reiterates this ground of decision:

> "Here, even apart from the circumstances that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, *as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representatives.* Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect pro-

foundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice."

We respectfully suggest, therefore, that the Trial Court misconceived the rule laid down by this Court and that whenever the primary in effect controls the election it becomes subject to federal regulation and is bound by the constitutional guarantees.

The Trial Court also expressed some doubt about whether the primary controlled the result. But of this there can be no doubt. The complaint (par. 12, R. 9) alleged that since 1859 all the democratic nominees, with two exceptions, had been elected to office and this was not denied in the answer (see R. 63) and was expressly admitted by stipulation (R. 72). Tables showing the results of elections for Governor, for United States Senator and for presidential electors were submitted (App. D. R. 28-57). Except in the years 1869 and 1894 the democratic nominee was elected Governor; only in 1872 and 1928 did the democratic presidential candidate fail to receive a majority of the votes; the democratic candidate for United States Senator has been elected ever since popular election of Senators began. And in the last four elections the total of all votes other than those cast for the democratic candidates for Governor and Senator was much less than 10% of the total vote cast. Under such circumstances it can hardly be doubted that the democratic primary determines the election.

The Circuit Court of Appeals merely said that it could see no substantial difference between the *Grovey* case and the one at bar. It did not enter into any discussion of the principles which governed this Court in deciding the *Classic* case. It pointed out only that this Court did not mention the *Grovey* case in its opinion in the *Classic* case.

We submit that the Circuit Court failed to appreciate that this Court had in the *Classic* case laid down a criterion which brings within the protection of the Constitution all voting in primaries, when the primary in effect controls the election.

We believe, therefore, that the *Classic* case has so far overruled the *Grovey* case that a Negro cannot be denied participation in a primary which, as here, controls the election.

2. Even if this Court did not intend to modify the *Grovey* case in the *Classic* case, we believe that the former decision should now be reconsidered and overruled. We recognize, of course, that this Court has consistently taken the position that neither the Fourteenth nor the Fifteenth Amendment applies to wrongs committed by private individuals, in that respect both being unlike the Thirteenth Amendment. And we realize that the language of the Fourteenth and Fifteenth Amendments justifies that position, however unfortunate its consequences may have been. Nevertheless, we believe that neither the language nor the history of these amendments requires so narrow an interpretation of what constitutes state action as was made when this Court held in the *Grovey* case that the acts there complained of were private action.

The general issue here involved was first sharply raised in the *Civil Rights Cases*, 109 U. S. 3. There the Court, over the eloquent dissent of Justice Harlan, held that Congress had no power to declare that discrimination against Negroes practiced by innkeepers or common carriers was unlawful. The majority of the Court rejected the notion advanced in that case that the state's power to regulate businesses affected with a public interest made the acts of those businesses state acts within the Fourteenth and Fifteenth Amendments. But we submit that the decision in the *Civil Rights Cases* does not justify the conclusions arrived at in the *Grovey* case.

For the relation between political parties and the state is quite different from the relation between businesses affected with a public interest and the state. Political parties are concerned with the most vital of all rights which exist in a democracy, the right of suffrage. The state has wide power of control over the manner in which political parties exercise their functions. To rule that discrimination by a political party in relation to voting is actually discrimination by the state is but to accept the realities of a situation and not to be misled by ingeniously devised forms. It should be observed that we are dealing in this case only with voting for public office. We are not here concerned with a right of a party to restrict its membership for the purpose of determining who may participate in the selection of its officials or the promulgation of its principles. We do not question that such acts are private acts, not state acts. But the choice of a political candidate, whether at a primary or at a general election, is not a private action, but a public one. It affects fundamental public rights and privileges. This is so whether or not state legislation directly concerns itself with primaries. All the more should it be so here where the Texas legislation requires that candidates of political parties be chosen at primary elections (Revised Civil Statutes Article 3101) and where such legislation contains detailed provisions for the safeguarding of the primary election (id.; see the various statutes listed in appendix "C" to the complaint). We submit, therefore, that voting at a primary election is such a matter of public concern that it cannot be considered the action of any private group. When the state permits a private group to function as a political party, though it bars persons from such voting merely because of their race, it in effect itself sanctions the discrimination and violates the Fourteenth and Fifteenth Amendments. The *Grovey* case should, therefore, be overruled.

3. There is a fact present in this case which was not present in the *Grovey* case which, we believe, requires a different conclusion here regardless of all other considerations. In the *Grovey* case this Court rested its determination on the assumption that only members of the democratic party were allowed to vote. The party had declared that only white persons could be members. Hence, it was implied, no Negroes could participate in the primary. The act of exclusion was, therefore, not the act of the election judges, but that of the party.

Here, however, it appears that the exclusion was the act of the election judges and that their supposed reliance on the exclusion by the party was a sham. For exclusion by the party could not directly affect the right to vote; it could affect only party membership. Therefore, if the election officers were excluding persons who were not party members, they were under an obligation to exclude all who were not party members. At least they could not discriminate on racial grounds. Yet this is just what they did here.

For defendant Allwright, the election judge, frankly admitted this discrimination. No attempt was made to determine whether white persons were, or were not, party members. He said:

> "Q. Mr. Allwright, when a white person comes into the polling place during the primary election of 1940 and asks for a ballot to vote do you ever ask them what party they belong to? A. No, we never ask them.
>
> Q. As a matter of fact, if a white elector comes into the polling place to vote in the Democratic primary election, he is given a ballot to vote; is that correct? A. Right.
>
> Q. And negroes are not permitted to vote in the primary election? A. They don't vote in the primary.
>
> Q. But any white person that is qualified; regardless of what party they belong to, they can vote? A. That is right.
>
> Q. And you do let them vote? A. Yes" (R. 106).

Now it is clear that, as a primary election judge, defendant was a state officer. The state law (Art. 2939) provides for such an election officer; it prescribes his qualifications (Art. 2955); it requires him to take an oath of office (Art. 3104); it fixes his powers (Art. 3105). When such an officer discriminates against persons solely because of their race he acts as a state officer and his action is reviewable under the guarantees of the United States Constitution. See *Nixon* v. *Herndon*, 273 U. S. 536; *Nixon* v. *Condon*, 286 U. S. 73. And it makes no difference that the discrimination is not commanded by statute, but is the individual vagary of the state official. *Norris* v. *Alabama*, 294 U. S. 587.

So we submit that, since membership in the party was not the basis on which white persons were allowed to vote, non-membership was not the basis on which Negroes were excluded. The discrimination was, therefore, on the basis of their race and was forbidden by both the Fourteenth and Fifteenth Amendments to the United States Constitution.

It is respectfully submitted, therefore, that the judgment should be reversed and the prayer of the complaint granted.

National Lawyers Guild,
Committee on Constitutional Liberties,
as Amicus Curiae,

Osmond K. Fraenkel, Chairman,
Of Counsel.